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Report of the Presidency: Towards updated model provisions

On the basis of the reflections initiated by the Belgian Presidency of the Council this year and continued by the Hungarian Presidency with regard to the elaboration of model provisions for EU criminal law, delegations will find in annex a Report of the Presidency.

REPORT OF THE HUNGARIAN PRESIDENCY OF THE COUNCIL

TOWARDS UPDATED MODEL PROVISIONS FOR EU CRIMINAL LAW

Following comprehensive discussions at expert level, the Presidency has produced the model provisions of EU criminal law. The model provisions are provisional and are primarily intended to be used as a basis for discussions with the co-legislator in the European Parliament (EP) and the Commission.

The model provisions should be read in the light of the following considerations:

- As the Council Conclusions¹, adopted in June, urged for an interinstitutional debate, the Presidency has held informal exchanges with its interlocutors in the EP and the Commission on the issue.
- Based on discussions both internally in the Council and in informal discussions with the other institutions, the Presidency emphasizes the common understanding that the model provisions should not be binding on the legislators, but rather be seen as a “toolbox” from which the legislators can choose the provisions they wish to include in a legislative act.
- A "toolbox" typically refers to a set of guidelines, frameworks, or model provisions designed to aid lawmakers in drafting, discussing legislation. It is meant to provide practical support, ensuring consistency, coherence, and efficiency across different legislative files, especially in complex fields like criminal law.
- Certain aspects of the model provision below appear to be more controversial than others. Those parts have been included within brackets and in italic letters in the text. The inclusion of these aspects in future legislative acts may need to be justified by particularly strong needs.

¹ Council conclusions on ‘The future of EU criminal law: recommendations on the way forward’

Toolbox

with model provisions on EU substantive criminal law

Given the evolving nature of EU criminal law, there is a need for coherence among related directives. A set of guidelines or model provisions would be timely and helpful for lawmakers to draft and discuss legislation in the area of criminal justice consistently. This would offer practical support for coherence and efficiency without being binding.

It is important to ensure that criminal law is used only as a last resort and that legislation respects the principles of proportionality and subsidiarity. A clear legal basis under the Treaty on the Functioning of the EU (TFEU) is also essential to enhance legal certainty across member states.

The EU institutions' respective roles, especially within the usual legislative process, must be respected.

The proposed toolbox is designed to support discussions in the Council by providing a structured yet flexible approach to complex criminal law issues, without making these provisions mandatory. The toolbox will also provide an important basis for exchanges with the co-legislator in the European Parliament and with the Commission, be it in legislative negotiations or policy discussions.

The Council suggests that, where applicable, future legislative texts should, as much as possible, follow the approach outlined in these agreed model provisions.

A. PENALTIES FOR NATURAL PERSONS

1. Member States shall take the necessary measures to ensure that where a natural person [intentionally] commits an offence referred to in [Article(s) ...], the criminal offence is punishable by effective, proportionate and dissuasive criminal penalties.
2. Member States shall ensure that the criminal offences referred to in [Article(s) ...] are punishable by a maximum penalty of imprisonment of at least [one/two/five/ten] years;
- [3. Member States shall ensure that natural persons who have committed criminal offences referred to in [Article(s) ...] may be subject to other criminal or non-criminal penalties or measures which may include the following:
 - (a) an obligation to:
 - (i) ; or
 - (ii) ...;
 - (b) fines that are proportionate to the gravity of the conduct and to the financial and other circumstances of the natural person concerned and, where relevant, that are determined taking due account of the gravity and duration of the damage caused to [...];
 - (c) exclusion from access to public funding, including tender procedures, grants, concessions and licences;
 - (d) disqualification from holding, within a legal person, a leading position of the same type used for committing the offence;
 - (e) withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence.]

B. OFFENCES OF INCITING, AIDING AND ABETTING AND ATTEMPT

Member States shall ensure that inciting, and aiding and abetting, the commission of an intentional criminal offence covered by [Article(s) ...] is punishable as a criminal offence.

Member States shall ensure that an attempt to commit an [intentional] criminal offence covered by [Article(s) ...] is punishable as a criminal offence.²

C. AGGRAVATING AND MITIGATING CIRCUMSTANCES

*Aggravating circumstances*³

To the extent that the following circumstances do not form part of the constituent elements of the criminal offences referred to in [Article(s) ...], Member States shall take the necessary measures to ensure that, in relation to the criminal offences referred to in Articles [... and ...], one or more of the following circumstances can, in accordance with national law, be regarded as an aggravating circumstance:

....; and

.....

² The following model language for a recital (taken from the recent acquis) could be added:
“*The notion of ‘attempt’ is interpreted in accordance with national law.*”

³ It has been suggested that the model provisions should also include a standard recital underlining the freedom of the judge to assess the appropriate penalty to decide for each individual case. A recent example of such recital that may be interesting in this sense can be found in the Environmental Crime Directive:
“*Penalty levels imposed should be further approximated and the effectiveness of such levels should be fostered through introducing common aggravating circumstances that reflect the gravity of the criminal offence committed. The notion of ‘aggravating circumstances’ should be understood either as facts enabling the judge to pronounce more severe sentences for the same criminal offence than the sentence normally imposed without such facts, or as the possibility to treat several criminal offences cumulatively in order to increase the level of penalty. Therefore, Member States are not obliged to provide for specific aggravating circumstances where national law already provides for separate criminal offences that can lead to more severe penalties.*”

[Mitigating circumstances]

Member States shall take the necessary measures to ensure that, in relation to the criminal offences referred to in [Article(s) ...], one or more of the following circumstances can, in accordance with national law, be regarded as mitigating circumstances:

(a) ...;

(b)]

D. LIABILITY OF LEGAL PERSONS

1. Member States shall ensure that legal persons can be held liable for the [criminal] offences referred to in [Article(s) ...] where the criminal offences has been committed for the benefit of those legal persons by a person who has a leading position within that legal person and who acts individually or as part of an organ of that legal person on the basis of any of the following ('leading person'):
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person; or
 - (c) an authority to exercise control within the legal person.
2. Member States shall ensure that legal persons can be held liable for criminal offences referred to in [Article(s) ...] where the lack of supervision or control by a leading person has made possible, by a person under their authority, the commission of a criminal offence referred to in [Article(s) ...], for the benefit of, that legal person.
3. The [criminal] liability of legal persons under paragraphs 1 or 2 of this Article shall not preclude criminal proceedings against natural persons who commit, incite or are accessories to the criminal offences referred to in [Article(s) ...].

E. PENALTIES FOR LEGAL PERSONS

1. Member States shall ensure that where a legal person is held liable pursuant to [Article ...], the criminal offence is punishable by effective, proportionate and dissuasive criminal or non-criminal penalties or measures.

Effective, proportionate and dissuasive criminal or non-criminal penalties or measures shall include criminal or non-criminal fines and may include other criminal or non-criminal penalties or measures, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) exclusion from access to public funding, including tender procedures, grants and concessions;
- (c) disqualification from the practice of business activities;
- (d) withdrawal of permits and authorisations to pursue activities which have resulted in the offence;
- (e) placing under judicial supervision;
- (f) judicial winding-up;
- (g) closure of establishments used for committing the criminal offence;
- (h) where there is a public interest, publication of all or part of the judicial decision relating to the criminal offence committed and the penalties or measures imposed, without prejudice to rules on privacy and the protection of personal data.

2. *[Member States shall ensure that where a legal person is held liable pursuant to [Article D(1)] for criminal offences referred to in [Article(s) ...], the criminal offence is punishable by criminal or non-criminal fines. The amount of such fines shall be proportionate to the gravity of the conduct and to the individual, financial and other circumstances of the legal person. Member States shall ensure that the maximum level of such fines is not less than:*
- (a) for criminal offences covered by [Article(s) ...]:*
- (i) [5 %] of the total worldwide turnover of the legal person, either in the business year preceding that in which the offence was committed or in the business year preceding the decision to impose the fine; or alternatively*
- (ii) an amount corresponding to EUR [maximum 40 000 000];*
- (b) for criminal offences covered by [Article]:*
- (i) [2/5%] of the total worldwide turnover of the legal person, either in the business year preceding that in which the offence was committed or in the business year preceding the decision to impose the fine; or alternatively*
- (ii) an amount corresponding to EUR [8/24/40 million]⁴.*
3. *[Member States may establish rules for cases where it is not possible to determine the amount of the fine on the basis of the total worldwide turnover of the legal person in the business year preceding that in which the offence was committed or in the business year preceding that of the decision to impose the fine.]*

⁴ The actual levels mentioned in the text should take into account the thresholds applied, taking into account the alternative thresholds adopted in the Envicrime and Violations of restrictive measures directives.

F. JURISDICTION

1. Each Member State shall establish its jurisdiction over the [criminal] offences referred to in [Article(s) ...] where:
 - (a) the criminal offence was committed in whole or in part within its territory;
 - (b) the criminal offence was committed on board a ship or an aircraft registered in that Member State or flying its flag; or
 - (c) the offender is one of its nationals.

2. A Member State shall inform the Commission where it decides to extend its jurisdiction to one or more criminal offences referred to in [Article(s) ...] which have been committed outside its territory, where:
 - (a) the offender is a habitual resident in its territory;
 - (b) the offence is committed for the benefit of a legal person established in its territory;
 - [(c) the offence is committed for the benefit of a legal person in respect of any business done in whole or in part on its territory;]*
 - (d) the offence is committed against one or more of its nationals or habitual residents; or
 - [(e) the offender is one of its officials who acts in his or her official duty].*

3. In cases referred to in paragraph 1, points [...] Member States shall ensure that the exercise of their jurisdiction is not subject to the condition that a prosecution can be initiated only following a *[report made by the victim in the place where the criminal offence was committed OR a denunciation from the State of the place where the criminal offence was committed.]*

IG. LIMITATION PERIODS

1. Member States shall take the necessary measures to provide for a limitation period [*which is commensurate to the gravity of the offence and*] that enables the investigation, prosecution, trial and adjudication of criminal offences referred to in Articles [...] for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.
- [2. *The limitation period referred to in paragraph 1 shall be of at least [...] years from the commission of a criminal offence punishable by a maximum term of imprisonment of at least [...] years.*
3. *Member States shall take the necessary measures to provide for a limitation period of at least [...] years from the date of the final conviction for a criminal offence referred to in Articles [...] that enables the enforcement of the following penalties imposed following that conviction:*
 - a) *a penalty of imprisonment of more than [...]; or alternatively*
 - b) *a penalty of imprisonment for a criminal offence punishable by a maximum term of imprisonment of at least [...] years.*
4. *By way of derogation from paragraphs 2 and 3, Member States may establish a limitation period that is shorter than [...] years, but not shorter than [...] years, provided that such limitation period may be interrupted or suspended in the event of specified acts.]*

H. STATISTICAL DATA

1. Member States shall ensure that a system is in place for the collection, development, productions and dissemination of public statistical data on offences referred to in [Article(s) ...].
- [2. *Without prejudice to reporting obligations laid down in other Union legal acts, Member States shall, on an annual basis and if they are available at central level, submit to the Commission statistical data referred to in paragraph 1 which shall, as a minimum, include existing data on:*
 - (a) *the number of criminal offences registered and adjudicated by the Member States;*
 - (b) *the number of court cases that are dismissed, including on the grounds of expiry of the limitation period for the criminal offence concerned;*
 - (c) *the number of natural persons that are prosecuted.*
3. *Member States shall ensure that data transmitted to the Commission is compiled and published at least every third year.]*
4. The Commission shall, at least every three years, publish a report based on the statistical data transmitted by the Member States. The report shall be published for the first time three years after the standard format referred to in [Article ...] has been established.

[The Member States shall make the statistics collected pursuant to this Article available to the public in an easily accessible manner. Those statistics shall not contain personal data.]

I. TRAINING

[Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall take necessary measures to ensure that specialised regular training is provided to judges, prosecutors, police and judicial staff and to competent authorities' staff involved in criminal proceedings and investigations with regard to the objectives of this Directive and appropriate to the functions of such judges, prosecutors, police and judicial staff and competent authorities' staff.]
